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No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1980 TERM

PHILIP E. STEVENS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari to The Court of Appeals
First Appellate District of Ohio
Clermont County, Ohio

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

On March 4, 1978, Petitioner left his restaurant in Milford, Clermont County, Ohio and drove to an auto body shop which he owned. In his vehicle, on the front seat, Petitioner had a Model 64 stainless steel .38 caliber Smith and Wesson revolver, which was loaded. He telephoned a friend's apartment, whereupon said friend, Patricia West, complained about loud music coming from the apartment

below hers. Petitioner replied that he would come to Ms. West's apartment building to help her with the problem. On his way to the apartment, Petitioner made a deposit at the night depository of his bank.

When Petitioner arrived at the apartment building, at approximately 10:30 P.M. he went to the apartment located below Ms. West's apartment. The resident, Larry Keoler, answered the door with a billards cue in his hand, as he and his wife were playing a game of billiards. A verbal confrontation ensued between Petitioner and Mr. Keoler regarding the loud music. The altercation attracted the resident of the apartment across the hall, Deanna York. Looking through the peephole in her door, Ms. York observed Mrs. Keoler pull her husband into their apartment, then close and lock the door. Ms. York then observed the Petitioner remove a gun from under his coat, point the gun at the Keoler's door for five to ten seconds, return the gun to coat, and proceed upstairs. When Ms. York advised the Keolers of this, they telephoned the police.

When the police responded, after questioning Ms. York and the Keolers, they proceeded to Ms. West's apartment. Upon obtaining consent of Ms. West to a search of her apartment, the officers discovered a revolver in the living room. Said revolver was positively identified by Ms. York as the gun which she observed in Petitioner's possession.

On April 5, 1978, Petitioner was indicted by the Grand Jury of Clermont County, Ohio for carrying a concealed weapon, contrary to and in violation of Section 2923.12 of the Ohio Revised Code. Petitioner entered a plea of not guilty. The motion to suppress evidence, filed by Petitioner, was heard and subsequently overruled.

At the trial by jury, commencing on October 13, 1978,

Petitioner sought to introduce into evidence testimony by three police officers that they had advised petitioner of his right to carry a weapon and the circumstances under which he could properly do so. The trial court sustained the prosecution's objection to such testimony.

In its instructions to the jury, the trial court included an instruction regarding the affirmative defense of justification to the offense of carrying a concealed weapon. The jury returned a verdict of guilty.

SUMMARY OF ARGUMENT

The trial court properly refused evidence offered by Petitioner regarding police officers' advice to him that he could carry a weapon under certain circumstances. Police officers are not qualified to advise an individual of his legal right to carry a weapon. Such testimony may have been prejudicial by giving the jurors the erroneous impression that the Petitioner was acting pursuant to proper legal advice. Furthermore, even if Petitioner had been misinformed, mistake as to law is no defense where the offense in question requires only that the offender act knowingly, regardless of purpose.

The trial court instructed the jury on the affirmative defense of justification. Where evidence is conflicting as to whether a defendant was justified in carrying a weapon, so that reasonable minds might arrive at different conclusions, a finding of guilty is not prejudicial error.

ARGUMENT OF LAW

Ohio Revised Code Section 2901.22 (B) provides in pertinent part:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature."

Carrying a concealed weapon, in violation of Ohio Revised Code Section 2923.12, requires that the person act "knowingly," meaning with regard to the particular offense in question, that the person is aware that he is carrying a weapon and that the manner in which he is carrying it will probably result in its being concealed. Irrespective of any other evidence presented at trial, Petitioner himself supplied the answer to the question as to whether he had the requisite degree of culpability.

> Q. You did, knowingly, have concealed on your person a loaded 38 caliber gun. Am I not correct in that statement?
>
> A. Yes, sir, you are.

By way of justification, Petitioner introduced evidence regarding his various business ventures, his ownership of a camp which had been vandalized on several occasions, his late and irregular working hours, and the fact that he occasionally made deposits of money late at night. In fact, all three police officers who responded to the radio dispatch of a "man with a gun", testified that Petitioner told them many of these same facts when they observed and seized his gun, and that Petitioner also told them that he had received permission from other police departments to carry a weapon. In conjunction with Petitioner's testi-

mony as to the route he took and the time schedule he followed on the night of the offense, the evidence which may have constituted an affirmative defense to the charge was before the jury, and it was within their province to determine whether, under all the circumstances, a justification for Petitioner carrying a concealed weapon existed at the time in question. In light of the trial court's instruction regarding the affirmative defense of justification, the jury could not have found Petitioner guilty if they found that there was a justification.

Where, at the trial of a person charged with carrying a concealed weapon, the evidence is conflicting as to whether he was justified in carrying the weapon, so that reasonable minds might arrive at different conclusions, and there is substantial credible evidence of probative value from which the jury could properly determine that no justification existed, a finding of guilty is not prejudicial error. *State* v. *Hall,* 6 Ohio App. 2d 114, 215 N.E. 2d 635 (1964).

In the instant case, Petitioner had left his various places of business, had passed within several hundred yards of one of the branch offices of his bank on his way home, then left home, made a deposit at a different branch on his way to the apartment of his friend, Patricia West. He explained that he felt it necessary to carry the gun into the apartment because his vehicle wasn't secure, even though he had left the gun in the truck when he was at one of his businesses. He testified that it was his intention to check his camp after he left Ms. West's and that he needed the gun for his safety. The jury obviously didn't find the Petitioner's testimony to be credible as it related to his justification for carrying the gun. "One cannot, simply because he may have been justified at the time he first carried the concealed weapon, claim justification at a later time, in a completely different factual contest, when the

facts and circumstances originally constituting justification no longer apply." *State* v. *Johnson*, 60 Ohio Op. 2d 301, 283 N.E. 2d 452 (1972).

In order to substantiate his allegation that he had been advised by "other police departments" that he could carry a weapon, three defense witnesses were called who were or had been police officers. Defense counsel asked each of them what conversations they had had with Petitioner regarding his carrying a weapon. The prosecutor objected and the objections were sustained. The testimony of these witnesses as to their advice to Petitioner was irrelevant because they were not qualified to advise him as to his legal status with respect to carrying a weapon, and being police officers, their testimony may have been prejudicial by creating in the minds of the jurors the erroneous impression that Petitioner was acting pursuant to proper legal advice. Even if Petitioner was misinformed, his mistake as to the law is no defense to a charge which requires only that he act "knowingly, regardless of his purpose."

In *State* v. *Wenger*, 58 Ohio St. 2d 336, 390 N.E. 2d 801 (1979), the Appellant argued that because he was mistaken as to the factual circumstances, he lacked criminal mens rea. The Supreme Court of Ohio held that where the degree of culpability is "knowingly", motive, purpose or mistake of fact is of no significance. In the instant case, Petitioner's interpretation as to his right to carry a weapon is not one of the affirmative defenses provided for in the statute, irrespective of the course of his mistaken belief, unless, of course, one of the justifications provided by statute existed at the time in question, which the jury did not find. Therefore, the testimony of witnesses who may have been the source of his belief was irrelevant and properly disallowed by the trial court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court deny Petitioner's writ of certiorari to review the judgment of the Court of Appeals for the First Appellate District of Ohio.

Respectfully submitted,

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